Ng Kim Lim Engineering Sdn Bhd v Hercules Engineering (SEA) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D-22–1543 OF 2009
TENGKU MAIMUN J
13 MAY 2011

Contract — Joint venture — Joint venture agreement — Supply of construction and industrial materials — Demand for outstanding balance — Back to back payment basis — Whether terms of payment agreed — Whether joint venture company operational and dormant up to date

At the defendant's request, the plaintiff agreed to sell and supply construction and industrial material goods, among others, such as joints, screws, bolts, nuts, steel plates and machinery ('the said goods') to the defendant. The said goods were delivered and accepted by the defendant. The defendant made regular partial payments to the plaintiff for the said goods, whereby as at September 2007, a total sum of RM15,278,937 had been paid to the plaintiff and despite numerous reminders and demands from the plaintiff, the defendant failed, neglected and/or refused to pay the sum of RM1,496,492.48 ('the sum') being the balance outstanding for the said goods which the plaintiff now claimed for. The defendant denied owing the said sum to the plaintiff. The defence's case was that the plaintiff and the defendant had entered into a joint venture arrangement whereby a company called NKL-Hercules Engineering JV Sdn Bhd was incorporated and the defendant would only pay the plaintiff after the defendant received payment from its clients on a back to back basis. It was also the contention of the defendant that the plaintiff's claim would include goods not delivered. A joint venture company called NKL-Hercules Engineering JV Sdn Bhd was incorporated of which the shareholders were Chong Seng Shia and Ng Kim Lim of the defendant and the plaintiff respectively in equal shares. The plaintiff averred that the joint venture company was never operational and was dormant up to date. Dispute arose when the parties decided to finalise the accounts and decide on the profit sharing as what was agreed upon in the joint venture agreement.

Held:

(1) There was no evidence from the plaintiff that the disputes had been attended to or that the plaintiff had explained the discrepancies raised by the defendant. Those disputes were genuine disputes and the defendant had on the balance of probabilities, proved their allegation on claim on those three invoices in the total sum of RM36,701.35. Section 37 of the

Sale of Goods Act 1957 was not applicable in the circumstances of the case. Hence, there ought to be a deduction for those invoices (see para 18).

(2) The defendant had been paying the plaintiff since 1997 totaling more than RM15m and had never raised the issue of joint venture with the plaintiff until 2007. Even if there was originally the joint venture arrangement as contended by the defendant, the joint venture did not materialise as nowhere was it shown that thereafter, the parties were conducting themselves as partners. Throughout 1997 until 2007, there was not a single correspondence from the defendant to the plaintiff asserting that payment could not be made to the plaintiff until the defendant received payment from its client. In the absence of any contemporaneous document to support the proposition on the back to back payment, the contention of the defendant could not be accepted (see para 21).

(3) The plaintiff had been doing business with the defendant since 1997. It was strange and it defied common sense and logic that the terms as agreed in the joint venture agreement were not stated in the purchase orders/delivery orders or invoices or in the correspondence between the parties if indeed the goods and services were purchased by the defendant and delivered by the plaintiff pursuant to the joint venture. The correspondence from the defendant to the plaintiff dated 24 March 1998 did not reflect the relationship of the parties in a joint venture arrangement (see para 23).

(4) If the parties had agreed on the terms of back to back payment, that term should and would have been stipulated and not the term 'to be discussed'. The conduct of the parties did not reflect a joint venture relationship and the evidence for the plaintiff was more probable ie that notwithstanding the incorporation of NKL-Hercules Engineering JV, the joint venture arrangement was not carried out (see para 25).

(5) There was no issue raised on the back to back payment or the profit sharing in the meeting held on 1 June 2005 which in all probability, if indeed there was an agreement on the back to back payment and profit sharing, the said meeting would be the forum to settle the issue given the evidence that the partnership ceased in April 2005 and the parties had wanted to finalise the accounts (see paras 26–27).

[Bahasa Malaysia summary

Atas permintaan defendan, plaintif telah bersetuju untuk menjual dan membekalkan bahan-bahan pembinaan dan perindustrian, antara lain, seperti 'joints', skru, 'bolt', 'nuts', plat keluli dan jentera ('bahan-bahan tersebut') kepada defendan. Bahan-bahan tersebut telah dihantar dan diterima oleh defendan. Defendan membuat pembayaran separa secara tetap kepada plaintif

bagi bahan-bahan tersebut, yang mana pada bulan September 2007, sejumlah RM15,278,937 telah dibayar kepada plaintif dan walaupun beberapa peringatan dan tuntutan daripada plaintif, defendan gagal, cuai dan/atau enggan membayar jumlah RM1,496,492.48 ('jumlah tersebut') iaitu baki tertunggak bagi bahan-bahan tersebut yang dituntut oleh plaintif. Defendan menafikan berhutang sebanyak jumlah tersebut dengan plaintif. Kes pembelaan adalah bahawa plaintif dan defendan telah menandatangani perjanjian usaha sama di mana syarikat yang dikenali sebagai NKL-Hercules Engineering JV Sdn Bhd telah diperbadankan dan defendan hanya perlu membayar plaintif setelah defendan menerima bayaran daripada pelanggan-pelanggannya dengan dasar berturut-turut. Adalah juga menjadi hujah defendan bahawa tuntutan plaintif termasuklah barangan yang tidak dihantar. Syarikat usaha sama yang dikenali sebagai NKL-Hercules Engineering JV Sdn Bhd telah ditubuhkan di mana para pemegang saham adalah Chong Seng Shia dan Ng Kim Lim daripada defendan dan plaintif masing-masing mempunyai saham yang sama. Plaintif menegaskan bahawa syarikat usahasama tidak pernah beroperasi dan tidak aktif sehingga kini. Pertikaian timbul apabila pihak-pihak memutuskan untuk menamatkan akaun dan membuat keputusan ke atas perkongsian keuntungan seperti yang telah dipersetujui dalam perjanjian usaha sama.

Diputuskan:

(1) Tiada keterangan oleh plaintif bahawa pertikaian telah diselesaikan atau bahawa plaintif telah menjelaskan percanggahan yang dibangkitkan oleh defendan. Pertikaian-pertikaian tersebut adalah pertikaian sebenar dan defendan telah, pada imbangan kebarangkalian, membuktikan dakwaan mereka bagi tuntutan ke atas ketiga-tiga invois berjumlah RM36,701,35. Seksyen 37 Akta Jualan Barangan 1957 tidak terpakai dalam hal keadaan kes ini. Oleh itu, perlu ada potongan ke atas invois-invois tersebut (lihat perenggan 18).

(2) Defendan telah membayar plaintif sejak tahun 1997 dengan jumlah keseluruhannya lebih daripada RM15 juta dan tidak pernah membangkitkan isu usaha sama dengan plaintif sehinggalah tahun 2007. Walaupun pada asalnya terdapat urusan usaha sama seperti yang dihujahkan oleh defendan, usaha sama tersebut tidak terbentuk kerana tiada di mana-mana yang menunjukkan bahawa selepas itu, pihak-pihak telah memperlakukan diri mereka sebagai rakan-rakan kongsi. Sepanjang tahun 1997 hingga 2007, tiada satu pun surat-menyurat daripada defendan kepada plaintif menuntut pembayaran yang tidak dapat dibuat kepada plaintif sehinggalah defendan menerima bayaran daripada pelanggannya. Dengan ketiadaan mana-mana dokumen semasa untuk menyokong cadangan bayaran berturut-turut, hujahan defendan tidak dapat diterima (lihat perenggan 21).

(3) Plaintif telah menjalankan perniagaan dengan defendan sejak tahun 1997. Adalah pelik dan bertentangan dengan akal dan logik bahawa syarat-syarat yang dipersetujui dalam perjanjian usaha sama telah tidak dinyatakan dalam pesanan pembelian/penghantaran atau invois-invois atau surat-menyurat antara pihak-pihak jika barangan-barangan dan perkhidmatan-perkhidmatan tersebut telah dibeli oleh defendan dan dihantar oleh plaintif berikutan usaha sama tersebut. Surat-menyurat daripada defendan kepada plaintif bertarikh 24 Mac 1998 tidak mencerminkan hubungan pihak-pihak dalam perjanjian usaha sama (lihat perenggan 23).

(4) Sekiranya pihak-pihak telah bersetuju dengan syarat-syarat pembayaran berturut-turut, syarat-syarat tersebut harus dan sepatutnya telah ditetapkan dan bukan menggunakan istilah 'to be discussed'. Tindakan pihak-pihak tidak mencerminkan hubungan usaha sama dan keterangan plaintif mempunyai kemungkinan yang lebih tinggi bahawa walaupun NKL-Hercules Engineering JV ditubuhkan, urusan usaha sama tidak dijalankan (lihat perenggan 25).

(5) Tiada isu yang dibangkitkan mengenai pembayaran berturut-turut atau perkongsian keuntungan dalam mesyuarat yang diadakan pada 1 Jun 2005 yang dalam semua kemungkinan, jika benar-benar terdapat perjanjian pembayaran berturut-turut dan perkongsian keuntungan, mesyuarat tersebut akan menjadi forum untuk menyelesaikan isu tersebut memandangkan keterangan menunjukkan bahawa perkongsian tersebut tamat pada bulan April 2005 dan pihak-pihak ingin menamatkan akaun (lihat perenggan 26–27).]

Notes

For cases on joint venture agreement, see 3(3) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 5110–5114.

Cases referred to

Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (folld)

Legislation referred to

Sale of Goods Act 1957 s 37

Eric Tan Choon Heong (Mohd Khairul Azwan with him) (Lim Soh & Goonting) for the plaintiff.
Kevin Sathiaseelan @ Joshua Kevin (Thivina Kumaran with him) (Kevin & Co) for the defendant.

Tengku Maimun J:

[1] The plaintiff's case is as follows. At the defendant's request, the plaintiff

has agreed to sell and to supply construction and industrial material goods, among others such as joints, screws, bolts, nuts, steel plates and machineries ('the said goods') to the defendant; that the plaintiff has been supplying goods to the defendant since 1997; that at all material times the said goods have been delivered and accepted by the defendant; that the defendant has made regular partial payments to the plaintiff for the said goods, whereby as at September 2007, a total sum of RM15,278,937 has been paid to the plaintiff and that despite numerous reminders and demands from the plaintiff, the plaintiff has failed, neglected and/or refused to pay the sum of RM1,496,492.48 being the balance outstanding for the said goods which the plaintiff is now claiming.

[2] The defendant denied owing the said sum to the plaintiff. The defence essentially is that the plaintiff and the defendant had entered into a joint venture arrangement whereby a company called NKL-Hercules Engineering JV Sdn Bhd was incorporated and that pursuant thereto, the defendant will only pay the plaintiff after the defendant received payment from its clients (back to back basis); that even if there is any amount owing to the plaintiff, it would have to be set off with the profits that were due to the defendant under the joint venture arrangement. It was also the contention of the defendant that the plaintiff's claim includes goods not delivered.

[3] Whilst it is not in dispute that a joint venture company called NKL-Hercules Engineering JV Sdn Bhd was incorporated of which the shareholders are Chong Seng Shia and Ng Kim Lim of the defendant and the plaintiff respectively in equal shares, the plaintiff avers that the joint venture company was never operational and was dormant up to date.

[4] The defendant relied on among others a letter signed by Ronnie Yow, the group general manager of the plaintiff dated 29 March 1997 (exh P4) addressed to Mr Thomas SS Chong of the defendant ('DW2') to support its contention that there was a joint venture agreement between the parties. The letter states:

> RE: NKL-HERCULES ENGINEERING JV
>
> With reference to the meeting between your goodself, Mr. Ng Kim Lim and the undersigned, it is confirmed that NKL-Hercules Engineering JV (hereinafter called NKL-HESEAJV) will remain its incorporation for future plans. We also write to confirm our mutual agreement to the following terms and conditions:
>
> (1) Instead of awarding to NKL-Hercules Engineering JV, Hercules Engineering (SEA) Sdn Bhd (hereinafter called HESEA) will issue Purchase/Work Orders to Ng Kim Lim Engineering Sdn Bhd (hereinafter called NKL).
>
> (2) NKL will offer best possible prices to HESEA for bidding but to retain minimum 20% of selling price as minimum net profit for each project.

(3) Instead of billing NKL-Engineering JV, NKL shall issue invoices to HESEA upon delivery.

(4) In the spirit of joint-venture, it is therefore agreed that the payment terms and work conditions between NKL and HESEA shall be on back to back basis between HESEA and its clients. HESEA shall make payments to NKL after it has received the payments from its clients.

(5) The profits will be calculated based on the 20% minimum profit margin and distributed half to HESEA based on the registered 50-50 equity as agreed in NKL-Hercules Engineering JV.

(6) We further confirm that NKL will keep in confidentiality all designs and the trade secret of Hercules Engineering (SEA) Sdn Bhd and shall not release such information to any third party without obtaining prior written consent.

[5] The defendant's reply dated 31 March 1997 (exh D9) to the above letter reads:

SUBJECT: NKL-HERCULES ENGINEERING JV

Further to your letter dated 29th Mar 1997 and our subsequent phone discussion, we write to confirm the following relevant notes;

(1) It is obviously (sic) you may face cashflow difficulties, as such we agree that the profit distribution can be deferred as you requested. Since the business partnership will be a long term co-operation, it will be a continuous running account for many jobs in future. Therefore the accumulated profit can be used to contra off any outstanding payments (if any).

(2) Now that the terms and conditions have been mutually agreed, we will commence issuing you production drawings for costing. Please instruct your people to response soonest possible with best possible price to enable us to submit our competitive bids.

(3) Note that the mill certificates for all materials used are required and to be submitted to us for our onwards submission to our clients for payments.

THE EVIDENCE

[6] Mr Ng Kim Leng ('PW2'), gave evidence that the joint venture was never carried out. It was also the evidence of PW2 that the defendant has been paying the plaintiff for all the invoices from 1997–2005 with no mention of any joint venture when payments were made. He also testified that he was not aware of the letter written by Ronnie Yow until 2007 and that he had lodged a police report as he believed the contents of exh P4 was forged as he was not aware of the terms and conditions of the joint venture mentioned in the letter.

[7] PW4, the general manager who handles the financial aspects of the

plaintiff produced a statement of account detailing the transaction between the plaintiff and the defendant between the years 1997–2005 (exh P15).

[8] Mr Ronnie Yow ('DW1') was the group general manager of the plaintiff at the material time. He resigned from the plaintiff sometime in October 1997. He said that he had personally dealt with the defendant for partnership co-operation sometime back in 1997 and that the understanding of the parties to the joint venture is that all contracts obtained by the defendant is to be passed on to the joint venture company and the joint venture company is to pass on the work to the plaintiff. It was also his evidence that the parties carry out the joint venture as planned but instead of awarding to the joint venture company, the defendant was to issue purchase/work order directly to the plaintiff. DW1 confirmed issuing the letter dated 29 March 1997 in his capacity as the group general manager of the plaintiff and further said that it was issued with the instructions of PW2.

[9] It was further the evidence of DW1 that during his tenure in the plaintiff's company, the payment terms between the plaintiff and the defendant was made back to back as per the terms of the joint venture.

[10] DW2 gave evidence that apart from exhs P4 and D9, the partnership between the plaintiff and the defendant is established by the following facts, ie that the plaintiff had allowed the defendant to occupy and use their factory lot since 1996 although the defendant had only entered into a sale and purchase agreement with the plaintiff in March 2005; that it was agreed between the parties that it is a profit sharing corporation wherein payments to the plaintiff will only be made once the defendant's clients had made payment to the defendant. It was also the evidence of DW2 that the partnership of the parties had ceased in April 2005. Hence the parties decided to finalise the accounts and decide on the profit sharing as what was agreed upon in the joint venture agreement.

DECISION

[11] As the oral testimony of the plaintiff's and the defendant's witnesses are diametrically opposite each other particularly in respect of the issue of joint venture, I will examine the contemporaneous documents as guided by the case of *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229.

[12] The defendant did not dispute that the value of the purchase order from the plaintiff is RM16,775,581.28 and that the defendant had already made payment to the plaintiff in the sum of RM15,278,938.80 leaving a balance of RM1,496,642.48 due (see exh D14). The defendant however contends that

the plaintiff ought to make adjustment for the following items:

(a) agreed amount to be credited to the defendant (RM13,547.20);

(b) the machinery sold but not delivered (RM10,000);

(c) over claim for expansion joint (RM60,572.15); and

(d) bad debts/default payment by the defendant's client (RM851,781.33) amounting to the total of RM935,900.68.

[13] Further, the defendant contends that 10% of the total work done must be deducted from the plaintiff's claim being the profit due to the defendant pursuant to the joint venture arrangement. Having taken all those figures into consideration, the defendant's case is that it is the plaintiff that owes the defendant money in the sum of RM1,023,226.26 which amount the defendant is now counterclaiming against the plaintiff.

[14] In light of exh D14 and before going into the adjustments suggested by the defendant, I find that the plaintiff has proved its case that there is an outstanding amount due from the defendant in the sum of RM1,496,642.48. The question to be asked now is whether the defendant has proved the adjustments (except for item (a) which has been agreed by the plaintiff during the trial). The adjustment in item (d) and the 10% profit would depend on whether the defendant has proved that the goods sold and delivered to the defendant by the plaintiff is subject to the joint venture agreement. Only if that is proven would the defendant be entitled to the adjustment for item (d) and the 10% profit.

[15] Firstly on the machinery not delivered. The plaintiff's witnesses testified that the machine was delivered based on the acknowledgment on the invoice at p 366 of the CBOD. The invoice in question is Invoice No NKLE/0224/05 dated 1 April 2005. The item disputed by the defendant is item no 16 ie Hyperthem Plasma Cutting Machine at the price of RM10,000. DW2 said that there was no delivery order and the machine was never delivered to the defendant. Further DW2 said that the defendant had disputed this item during the meeting held between the parties.

[16] I noted that in the meeting dated 1 June 2007 where parties specifically discussed disputed invoices, this particular Invoice No NKLE/0224/05 was not raised by the defendant as shown in the minutes of the meeting (exh D13). DW3 who prepared the minutes testified that the minutes is a complete representation of what transpired in the said meeting. I also noted that there is no other correspondence from the defendant to the plaintiff on this issue. I therefore find that the defendant has not proved its assertion that hyperthem plasma cutting machine was not delivered.

[17] Next on the over claim for the expansion joints. The evidence of DW2 basically is that the quantity of goods mentioned in the delivery order was not as per the actual delivery of the said goods. DW2 referred to the relevant invoices in disputes and to exhs D20 and D21 to support the defendant's case that the plaintiff has over claimed on this item.

[18] I find that out of the invoices referred to in exh D20, only Invoice Nos 1001479; 1001480 and 1001538 were raised in the meeting where Mr Ong of the plaintiff ('PW3') was to take action in respect of this issue. There is no evidence from the plaintiff that these disputes had been attended to or that the plaintiff has explained the discrepancies raised by the defendant. In fact the evidence of PW3 is that he was not able to trace the relevant delivery orders. I am therefore of the view that those disputes are genuine disputes and that the defendant has on the balance of probabilities proved their allegation on over claim on those three invoices in the total sum of RM36,701.35. I am also of the view that s 37 of the Sale of Goods Act 1957 is not applicable in the circumstances of the case. Hence, there ought to be a deduction for those invoices.

[19] The final item to be adjusted according to the defendant is the bad debts/default payment by the defendant's clients. Whether the defendant is entitled to this adjustment would depend on whether there is in existence a joint venture agreement and the back to back arrangement.

[20] The defendant's position that there was a joint venture agreement and that parties have agreed that payment to the plaintiff will only be made upon the defendant receiving payment from its clients, in my view is not probable given the totality of the evidence.

[21] The defendant had been paying the plaintiff since 1997 totaling more than RM15m and had never raised the issue of joint venture with the plaintiff until 2007. Even if there was originally the joint venture arrangement as contended by the defendant, it is my view that the joint venture did not materialise as nowhere was it shown that thereafter, parties were conducting themselves as partners. Throughout 1997–2007, there was not a single correspondence from the defendant to the plaintiff asserting that payment cannot be made to the plaintiff until the defendant received payment from its client. In the absence of any contemporaneous document to support the proposition on the back to back payment, I am thus not able to accept the contention of the defendant on this point.

[22] The defendant had also relied on the fact that PW2 received cash advance from the defendant as director; that the defendant had put a signboard on the plaintiff's land and that the defendant's staff were wearing the t-shirt bearing the name of the plaintiff's company to show the existence of the joint venture.

[23] These facts in my view are not sufficient to establish the joint venture arrangement as contended by the defendant. To reiterate, the plaintiff has been doing business with the defendant since 1997. It is strange and it defies common sense and logic that the terms as agreed in the joint venture agreement were not stated in the purchase orders/delivery orders or invoices or in the correspondence between the parties if indeed the goods and services were purchased by the defendant and delivered by the plaintiff pursuant to the joint venture. What we have is the following correspondence from the defendant to the plaintiff dated 24 March 1998 (exh P10) which does not reflect the relationship of the parties in a joint venture arrangement. The letter reads:

> Subject TERMS OF PAYMENT
>
> We write to advise you that we are currently negotiating many contracts locally and abroad and according to Hercules Engineering quotation book this is likely to lead to an increase in sales volume for the coming months. This would mean that the amount of work to be sub-contracted to your good company will subsequently be increased.
>
> In light of difficulties in debt collection due to the current cash crisis in Malaysia and the Asian region, we therefore wish to request for your financial co-operation and we herein advise you that until further notice all future invoices to Hercules Engineering will be *paid promptly on 90 days* in accordance with the following date of billing/payment:
>
> > Invoices received prior to 30th of 1st month will be paid by the end of the 1st week of the 4th month. Invoices received prior to 15th of 1st month will be paid by the end of the 3rd week of the 4th month.
>
> For instance, an invoice received on 26th March will be paid by 3rd July (end of 1st week). Similarly, an invoice received by 15th April will be paid 17th July (end of 3rd week).
>
> Please be reassured that all payments are guaranteed for goods and services supplied to Hercules in accordance with our job specification.

[24] Nowhere was it mentioned that the payment terms for the goods and services supplied by the plaintiff would be paid in accordance with the terms of the joint venture. Although the plaintiff admitted that the terms stated above had not been adhered to by the parties, the above letter, in my view would support the plaintiff's position that the joint venture arrangement was not carried out.

[25] It was put to the plaintiff that in all the quotations by the plaintiff to the defendant, the terms on payment was never stated. Instead it was 'to be discuss' (sic). The reason, according to the defendant is because of the joint venture. My view is that if parties had agreed on the terms of back to back payment, then that term should have and would have been stipulated and not the term 'to be discuss'. Looking at the evidence on the whole, I find that the conduct of the parties did not reflect a joint venture relationship and I find that the evidence for the plaintiff is more probable ie that notwithstanding the incorporation of NKL-Hercules Engineering JV, the joint venture arrangement was not carried out.

[26] Further, it must be noted that there was no issue raised on the back to back payment or the profit sharing in the meeting held on 1 June 2005 which in all probability, if indeed there was an agreement on the back to back payment and profit sharing, the said meeting would be the forum to settle the issue given the evidence of DW2 that the partnership ceased in April 2005 and parties had wanted to finalise the accounts.

[27] Given all the above I find that the plaintiff's claim herein is not subject to the joint venture agreement and there is thus no issue of back-to-back payment. This last item for adjustment must necessarily fail and it follows that the defendant's counterclaim premised on the 20% profit sharing is not proven.

[28] Judgment is entered against the defendant for the sum claimed minus the amount agreed by the plaintiff to be credited to the defendant and the invoices mentioned above (ie RM1,496,642.48 minus RM13,547.20 and RM36,701.35) with interests and costs. The defendant's counterclaim is dismissed with costs.

Order accordingly.

Reported by Afiq Mohamad Noor